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No. 99-1238

In the

Supreme Court of the United States

CHRISTOPHER ARTUZ,

Petitioner,

v.

TONY BRUCE BENNETT,

Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Second Circuit

BRIEF OF THE STATES OF FLORIDA, ALASKA, ARKANSAS, COLORADO, CONNECTICUT, DELAWARE, GEORGIA, ILLINOIS, LOUISIANA, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, SOUTH CAROLINA, SOUTH DAKOTA, UTAH AND VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Is a state court post-conviction application "properly filed" within the meaning of 28 U.S.C. § 2244(d)(2), which tolls the one-year statute of limitations for habeas corpus petitions, if the state court's procedural rules bar it from reaching the merits of the application?

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INTEREST OF THE AMICI CURIAE

Federal habeas corpus proceedings, by their very nature, involve second-guessing the state judicial process and delaying the date on which state judgments truly become final. Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 in response to concerns expressed by the Amici States and others that state court judgments were being treated with too little respect and that the habeas corpus process was taking far too long. This case addresses one of the measures enacted by Congress to tackle the latter concern, 28 U.S.C. § 2244(d). The one-year statute of limitations for filing habeas corpus petitions in federal courts established by § 2244(d) is a major innovation that could reduce by years the delays in executing state court judgments. The efficacy of the new limitations period will be destroyed, however, if the tolling provision set forth in § 2244(d)(2) is improperly interpreted. The Amici States have an abiding interest in ending undue delays in the habeas corpus process and in ensuring that the new limitations and tolling provisions are construed in accordance with Congress' intent.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) broke new ground in federal habeas corpus law by imposing a statute of limitations for filing habeas corpus petitions. Under 28 U.S.C. § 2244(d)(1), "a 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." The new law further provides, however, that the "time during which a *properly filed* application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C. § 2244(d)(2) (emphasis added). At issue in this case is the meaning of the term "property filed."

Under New York State law, a claim that had been previously determined on the merits on direct review is mandatorily barred from review under New York's post-conviction review procedure, set forth in New York Criminal Procedure Law (CPL) § 440.10. New York law likewise bars post-conviction review of a claim that could have been addressed on direct review had it been raised. *Id.* § 440.10(2). Respondent Bennett filed a post-conviction application that the State contends is procedurally barred for those very reasons. In the decision below, the Second Circuit held that, even if that is so, respondent's post-conviction application was "properly filed" and therefore tolled AEDPA's one-year limitations period. Pet. App. 14a-17a. More generally, the Second Circuit found the term "properly filed" to "mean simply that an application for state post-conviction relief recognized as such under governing state procedures has been filed." *Id.* 17a. That construction of the AEDPA's tolling provision is seriously flawed and should

be rejected by this Court. The better reading of § 2244(d)(2) is that a "properly filed" application is one that was raised correctly pursuant to state procedures, thereby permitting state courts to rule on the merits of the application.

A. The construction of § 2244(d)(2) advocated herein by the Amici States is – in contrast to the Second Circuit's construction – consistent with the plain and ordinary meaning of the word "properly." "Proper" is defined as meaning "strictly accurate" and "correct," suggesting that a "proper" or "properly filed" application is one that correctly complies with all of a State's procedural rules. The Second Circuit therefore errs in deeming as "properly filed" an application that was in no way procedurally "accurate" or "correct." Moreover, the types of procedural rules which the Second Circuit approach ignores for purposes of interpreting § 2244(d) are rules this Court has repeatedly found to be very significant to the state judicial process.

This Court's longstanding use of the words "proper" and "properly" in habeas corpus cases is consistent with the Amici State's construction of § 2244(d)(2). Numerous pre-AEDPA decisions of the Court used the words to denote compliance by a prisoner with all of the state procedural rules necessary for the state courts to reach the merits of the prisoner's claims. The Congress that enacted AEDPA can be presumed to have been familiar with those cases. And the decisions of this Court post-AEDPA – in particular, *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999) – powerfully confirm the terms' settled meaning.

B. The Second Circuit's interpretation of the term "properly filed" is also flatly inconsistent with the plain objectives of the newly-minted limitations period. The goal of the one-year

statute of limitations is to expedite the habeas corpus process and to end abusive delays and late filings. Yet the Second Circuit rule would permit prisoners to delay the running of the petition by filing frivolous, obviously improper state post-conviction applications. Indeed, the Second Circuit rule would permit prisoners to file, in bad faith, repeated applications for such review and thereby toll the limitations period indefinitely. Congress surely did not intend that the limitations period be utterly ineffective in most States until the States amend their post-conviction review processes to eliminate a tolling loophole.

Nor does the Second Circuit rule advance the objective of permitting prisoners to exhaust their state court remedies. It is textbook habeas corpus law that a procedurally improper filing such as respondent Bennett's does not exhaust state remedies. Similarly, second or successive applications that are procedurally rejected because they fail to raise new facts or law do not exhaust state remedies.

C. The doctrine of comity is advanced by a construction of "properly filed" under which federal courts look to state procedural rules to determine whether applications were filed "properly." Comity is also furthered by expediting the habeas corpus process – an objective undermined by the Second Circuit rule. It is true that, under the position advocated by the Amici States, federal courts will have to interpret state procedural rules. But federal courts already do that every time they are called upon to find a prisoner's claim unexhausted or procedurally barred. Finally, district courts are well-equipped to handle protective filings submitted by prisoners who in good faith have also filed second or successive state applications.

ARGUMENT

AN APPLICATION FOR STATE POST-CONVICTION RELIEF THAT IS BARRED BY THE STATE'S PROCEDURAL RULES IS NOT A "PROPERLY FILED" APPLICATION THAT TOLLS THE ONE-YEAR LIMITATIONS PERIOD ON FILING HABEAS CORPUS PETITIONS

The tolling provision of 28 U.S.C. § 2244(d)(2) reflects Congress' intent to ensure that state inmates first exhaust their claims in state court before filing habeas corpus petitions in federal court. In the run-of-the-mill case, the dual interests reflected in § 2244(d) – resolving inmates' claims expeditiously and respecting state tribunals – are satisfied without controversy. When a prisoner satisfies all of a State's procedural rules governing post-conviction relief, and the state courts deny relief through an opinion that reaches the merits of the claims, § 2244(d) is easily applied. The inmate's application was unquestionably "properly filed"; he then has one year from the date the state courts finally denied the application to file a habeas corpus petition in federal court (minus the time that elapsed between the end of direct review and the filing of his state post-conviction application).

Application of the tolling provision has engendered dispute when inmates' applications failed to comply with the States' procedural rules governing post-conviction relief. The Second Circuit, and several other lower courts, have ruled that an application for state post-conviction relief can be "properly filed" even if it is dismissed on the ground that it failed to meet a State's procedural rules. The Second Circuit stated that the words "properly filed" "mean simply that an application for

state post-conviction relief recognized as such under governing state procedures has been filed." Pet. App. 17a. More concretely, the court held that a "properly filed" application is any application that seeks post-conviction relief on its face and is filed in accordance with "the rules governing notice and the time and place of filing." Pet. App. 14a (quoting *Villegas v. Johnson*, 184 F.3d 467, 469 (CA5 1999) (quoting *Lovasz v. Vaughn*, 134 F.3d 146, 148 (CA3 1998)). Thus, even an application for post-conviction relief that is obviously barred because it presents claims that are only cognizable on direct review would be deemed "properly filed." *See, e.g.*, Pet. App. 16a.[1]

An alternative interpretation is that an application for state post-conviction relief is "properly filed" only if it correctly meets all of the state's procedural requirements governing post-conviction relief. Put slightly differently, a claim that cannot be heard on the merits under state law because it is barred by a state procedural rule is not "properly filed." The Ninth Circuit adopted this approach in *Dictado v. Durchame*, 189 F.3d 889 (CA9 1999), where it held that a prisoner's fourth state application that had been dismissed as time-barred and successive by the state's highest court was not "properly filed."

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[1] The precise contours of this approach (referred to herein as the "Second Circuit rule") are not clear. The Fifth Circuit has held that even an untimely application for post-conviction review is "properly filed" if, in limited circumstances, the state court may excuse the tardiness. *Smith v. Ward*, No. 98-30444, 2000 WL 358294 (CA5 April 7, 2000). Yet the Fifth Circuit had earlier held that "properly filed" refers to little else besides "the rules governing notice and the time and place of filing." *Villegas*, 184 F.3d at 469 & n.2, *quoted in* Pet. App. 14a.

Analysis of the language of § 2244(d), the goals of the new limitations period and tolling provision, and the comity interests underlying AEDPA demonstrate that Congress intended the latter interpretation.

A. The Term "Properly Filed" Is Most Sensibly Read As Taking Into Account All State Rules That Preclude State Courts From Considering The Merits Of An Inmate's Claims

In determining whether a procedurally barred application can nevertheless be "properly filed" within the meaning of § 2244(d)(2), the starting point is "the language of the statute." *Williams v. Taylor*, No. 99-6615, slip op. 8 (April 18, 2000) (citing *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989)). The word "proper" connotes (in this context) being done correctly. *See, e.g., Merriam Webster Collegiate Dictionary* 935 (10th ed. 1995) (defining "proper" to mean "strictly accurate" or "correct"); *Black's Law Dictionary* 1216 (6th ed. 1990) (defining "proper" as "[t]hat which is fit, suitable, appropriate, adapted, correct"). An action is not ordinarily thought of as "proper" if it is done in conformity with some applicable rules, but in contravention of others. An application for post-conviction relief is only "properly filed" if it is raised correctly pursuant to state procedures, thereby permitting the state court to address the merits of the claim.

The procedural rules which the Second Circuit concluded are irrelevant to determinating whether applications are "properly filed" are rules this Court has found to be of paramount importance. In *Murray v. Carrier*, 477 U.S. 478, 490 (1986), the Court stated that "[a] State's procedural rules serve vital purposes at trial, on appeal, and on state collateral attack."

Quoting *Reed v. Ross*, 468 U.S. 1, 10 (1984), the Court elaborated on the "purposes served by the procedural rule . . . which" – like New York CPL § 440.10 – "required the defendant initially to raise his legal claims on appeal rather than on postconviction review:"

It affords the state courts the opportunity to resolve the issue shortly after trial, while evidence is still available both to assess the defendant's claim and to retry the defendant effectively if he prevails in his appeal. . . . This type of rule promotes not only the accuracy and efficiency of judicial decisions, but also the finality of those decisions, by forcing the defendant to litigate all of his claims together, as quickly after trial as the docket will allow, and while the attention of the appellate court is focused on his case. (Citations omitted.)

This commonsense reading of the provision finds support in the "accumulated settled meaning[s]," *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981), of the adjective "proper" and the adverb "properly." Numerous opinions of this Court in habeas corpus cases have used those words to indicate compliance not only with the barebones procedural rules covered by the Second Circuit's rule, but with various other procedural rules that would prevent a state or federal court from reaching the merits of a prisoner's application or petition. Many of those opinions were issued before Congress enacted AEDPA, and Congress presumably was aware of them. *See Molzof v. United States*, 502 U.S. 301, 307 (1992) (quoting *Morrisette v. United States*, 453 U.S. 322, 329 (1981)). Others were issued after AEDPA's enactment and confirm the settled meanings. The list below is a sampling of those decisions (in each case with the words "proper" or "properly" placed in bold):

- *Wainwright v. Witt*, 469 U.S. 412, 431 n.11 (1985): "Under circumstances where the state courts do not rely on independent state grounds for disposing of a claim and instead reach the merits of a federal question, the federal question is **properly** before us."

- *Reed v. Ross*, 468 U.S. 1, 11 (1986): "To the extent that federal courts exercise their § 2254 power to review constitutional claims that were not **properly** raised before the state court, these legitimate state interests [requiring that issues be resolved shortly after trial on appeal, not postconviction review] may be frustrated . . . ."

- *Kuhlmann v. Wilson*, 477 U.S. 436, 444 n.6 (1986): "A 'successive petition' raises grounds identical to those raised and rejected on the merits on a prior petition. Our decision today concerns the circumstances under which district courts **properly** should entertain the merits of such a petition." (Citation omitted.)

- *Harris v. Reed*, 489 U.S. 255, 265 (1989): "The 'plain statement' requirement achieves the important objective of permitting the federal court rapidly to identify whether federal issues are **properly** presented before it."

- *Harris v. Reed*, 489 U.S. 255, 268 (1989) (O'Connor, J., concurring): "I do not read the Court's opinion as addressing or altering the well-settled rule that the lower federal courts, and this Court, may properly inquire into the availability of state remedies in determining whether claims presented in a petition for federal habeas corpus have been **properly** exhausted in the state courts."

- *McCleskey v. Zant*, 499 U.S. 467, 479 (1991): "With the exception of Fourth Amendment violations that a petitioner has been given a full and fair opportunity to litigate in state court, the writ today appears to extend to all dispositive constitutional claims presented in a **proper** procedural manner."

- *Coleman v. Thompson*, 501 U.S. 722, 767 (1990) (Blackmun, J., dissenting): Justice O'Connor's concurring opinion in *Harris v. Reed* "emphasize[d] that the Court's opinion did not alter the well-settled rule that federal courts may look to state procedural-default rules in determining whether a federal claim has been **properly** exhausted in the state courts."

- *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 7 (1992): "In light of these decisions, it is similarly irrational to distinguish between failing to **properly** assert a federal claim in state court and failing in state court to **properly** develop such a claim . . . ."

- *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 14 (1992) (O'Connor, J., dissenting): "To be sure, habeas corpus has its own peculiar set of hurdles a petitioner must clear before his claim is **properly** presented to the district court."

- *Sawyer v. Whitley*, 505 U.S. 333, 351 (1992) (Blackmun, J., dissenting): "Even as the Court has erected unprecedented and unwarranted barriers to the federal judiciary's review of the merits of claims that state prisoners failed **properly** to present to the state courts . . . ."

- *Reed v. Farley*, 512 U.S. 339, 354 (1994): "Where the petitioner – whether a state or federal prisoner – failed **properly** to raise his claim on direct review, the writ is available only if the petitioner establishes 'cause' for the waiver and shows" prejudice.

- *Breard v. Greene*, 523 U.S. 371, 377 (1998): "Even were Breard's Vienna Convention claim **properly** raised and proven, it is extremely doubtful that the violation should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial."

The recent decision in *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999), strongly supports the proposition that a "proper" post-conviction application is one that complies with all of a state's procedural rules and therefore is decided on its merits by the state courts. In *Boerckel*, the Court and the dissent addressed the interplay between exhaustion and procedural default. The Court stated that, to avoid allowing prisoners to evade the exhaustion requirement, it "ask[s] not only whether a prisoner has exhausted his state remedies, but also whether he has *properly* exhausted those remedies, *i.e.*, whether he has fairly presented his claims to the state courts." 526 U.S. at 848 (emphasis in original). The Court was echoing language in Justice Stevens' dissent: "A habeas petitioner who has concededly exhausted his state remedies must also have *properly* done so by giving the State a fair 'opportunity to pass upon [his claims]." *Id.* at 854 (emphasis in original) (quoting *Darr v. Burford*, 339 U.S. 200, 204 (1950)). A State does not have a "fair opportunity to pass upon an inmate's claims" if the inmate breaches a procedural rule and thereby prevents the state court from reaching the merits of his claims.

In *Edwards v. Carpenter*, No. 98-2060 (April 25, 2000), the Court applied *Boerckel*'s reasoning to the question whether the exhaustion requirement of *Murray v. Carrier*, *supra*, is subject to the procedural default rule. *Murray* required that, for a claim of ineffective assistance of counsel to serve as cause for the procedural default of some other constitutional claim, the ineffective-assistance claim first had to be raised in state court. 477 U.S. at 489. *Edwards* extended *Murray* by holding that mere presentation in state court was not enough – the claim had to be presented "in such a manner that the state court could . . ., consistent with its own procedural rules, have entertained it." *Edwards*, slip op. 6. In the terminology of *Boerckel*, the claim had to be "properly" presented. Respondent Bennett's application for post-conviction relief would not meet that test.[2]

B. The Second Circuit's Interpretation of the Term "Properly Filed" Undermines the Objectives of the Limitations Period and Fails to Advance the Objectives of the Tolling Provision

Assuming, *arguendo*, that the term "properly filed" is ambiguous, its meaning should be resolved by analyzing the policies underlying the limitations period and tolling provision.

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[2] Although the term "properly filed" is occasionally used in other contexts, it does not appear to be a legal term of art. The term has been used to describe proofs of claim filed in bankruptcy, tariffs filed under § 203(a) of the Communications Act of 1934, unfair labor practice claims instituted under the National Labor Relations Act, and notices of appeal generally. None of those *ad hoc* usages of the term indicates that an application, petition or claim of any sort can be "properly filed" even though the submission violates applicable procedural rules.

See Rose v. Lundy, 455 U.S. 509, 517 (1982) (citing *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975) ("'In expounding a statute, we must . . . look to the provisions of the whole law, and to its object and policy'" (citations omitted)); *United States v. Bacto-Unidisk*, 394 U.S. 784, 799 (1969) ("where the statute's language seem[s] insufficiently precise, the 'natural way' to draw the line 'is in light of the statutory purpose'" (citation omitted)). Such analysis confirms the failings of the Second Circuit rule.

1. The Second Circuit's Rule Would Undermine the Objective of the Limitations Period, Which is to Stop Abusive Delays and Late Filings

a. In enacting a limitations period for filing habeas corpus petitions, Congress responded to longstanding concerns about delays and last-minute filings in capital cases. The influential *Powell Report* recommended a limitations period for first habeas petitions, stating:

In death penalty jurisdictions, the sole incentive for a prisoner to initiate post-conviction review is either the scheduling of an execution date or the threat to schedule one. . . . It is clear that there must be a substitute mechanism to cause understandably reluctant state prisoners to seek post-conviction review when such action may remove the only obstacle preventing the State from carrying out the death sentence.[3]

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[3] U.S. Judicial Conference, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report and Proposal 19 (1989) (commonly referred to as the "Powell Report" after the Chairman of the Committee, Justice Lewis Powell).

The negative consequences of such delays had been much remarked-upon, both by this Court and members of Congress. In *Engle v. Isaac*, 456 U.S. 107, 127-28 (1982), the Court stated that it "must also acknowledge that writs of habeas corpus frequently cost society the right to punish admitted offenders. Passage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible. While a habeas writ may, in theory, entitle the defendant only to retrial, in practice it may reward the accused with complete freedom from prosecution." A decade letter, the problem of delay persisted: "This claim could have been brought more than a decade ago. There is no good reason for this abusive delay, which has been compounded by last-minute attempts to manipulate the judicial process." *Gomez v. United States District Court for the Northern District of California*, 503 U.S. 653, 654 (1992) (*per curiam*).

These concerns prompted the introduction in Congress of more than 80 bills proposing a statute of limitations for habeas corpus petitions in the 10 years prior to AEDPA's enactment. *See Lonchar v. Thomas*, 517 U.S. 314, 333 (1996) (Appendix listing the bills). When Congress finally reformed the habeas corpus laws in 1996, combating delay was at the forefront. According to the conference report: "[t]his title incorporates reforms to curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases." House Conf. Rep. No. 104-518, at 111 (April 15, 1996), *reprinted in* 1996 U.S.C.C.A.N. 944. The new one-year limitations period for filing habeas corpus petitions is a key element of that reform effort.

b. The Second Circuit's rule treats as "properly filed" at least two categories of applications that run afoul of state

procedural rules: (1) applications such as respondent Bennett's, which raise claims that are not cognizable on post-conviction review, and (2) second or successive applications that, in contravention of state rules, do not raise new facts or new legal rules that apply retroactively. The consequence of treating the first category of procedurally improper applications as "properly filed" is to allow inmates to extend the limitations period – in bad faith – for the many months it may take the state courts to reject the application as procedurally improper. The consequence of treating the second category of procedurally improper applications as "properly filed" is even greater: it allows inmates to extend the limitations period indefinitely by filing repeated applications in bad faith that do not genuinely raise any new facts or law. In capital cases, prisoners would have every incentive to take that course. Regardless of the precise length of the delay, the result will be undermining the one-year limitations period established by Congress.

As long as a state places limits on the issues that can be raised on post-conviction review, or leaves a safety valve for the filing of second or successive applications, inmates can easily abuse the Second Circuit rule and toll the limitations period irrespective of whether the state courts ever reach the merits of their applications. The Second Circuit rule would thereby frustrate the objectives of the limitations period in most states. For example, the large majority of death penalty states find second or successive applications to be procedurally barred the vast majority of the time, but their courts will review them in rare instances. *See, e.g.*, California: *In re Harris*, 5 Cal. 4th 813, 855 P.2d 391 (1993); Fla. R. Crim. P. 3.850(f); 725 Ill. LCS 5/122-3 (as construed in *People v. Flores*, 606 N.E.2d 1078 (Ill. 1992)); Md. Code Ann., Art. 27, § 645A; Mo. S. Ct. R. 91; N.C. Gen. Stat. §15A-1419(a); 42 Pa. Cons. Stat.

§ 9545(b)(1); Tex. Code Crim. P. arts. 11.070(4), 11.071(5); Utah R. Civ. P. 65C; Wash. Rev. Code § 10.73.140.

It is no response to suggest, as respondent Bennett and the Second Circuit have, that these States can amend their statutes to create ironclad barriers to their state court judges even receiving second or successive applications for post-conviction relief. *See* Resp. Opp. 7; Pet. App. 17a (quoting *Villegas*, 184 F.3d at 472-73). Congress enacted AEDPA with a backdrop of 50 state laws governing post-conviction relief. There is no reason to believe Congress had the unspoken intent that, in order for its newly-minted limitations period to be effective, most States would have to amend their respective statutes.

Slack v. McDaniel, No. 98-6322 (April 26, 2000), is not the contrary. In *Slack,* the Court observed that States could "impose proper procedural bars" to solve the problem of prisoners filing repeated mixed petitions in federal court. Slip op. 12-13. *Slack* did not, however, involve the interpretation of a new provision of law that would be undermined absent amendments to state laws across the country. *See id.* at 9 (noting that the case involved pre-AEDPA law). It is one thing to point out that state legislatures have the ability to solve a problem; it is another thing altogether to interpret a federal statutory term in a manner that saps it of effect absent widespread state legislative action.

2. The Second Circuit's Rule Does Not Advance the Objective of the Tolling Provision, Which is to Permit Inmates to Exhaust Their State Remedies Prior to Filing Habeas Corpus Petitions

One of the animating principles of habeas corpus jurisprudence is that state courts should have the first opportunity to hear inmates' claims that their convictions should be overturned. *See Coleman v. Thompson*, 501 U.S. 722, 732 (1991); *Ex parte Royall*, 117 U.S. 241, 251 (1886). In recognition of, and deference to, that principle Congress provided that "properly filed" applications for state relief would toll the one-year limitations period. This permits an inmate to exhaust his state avenues of relief without fear that the one-year limitations period for any future habeas corpus petition would expire. Had Congress not tolled the limitations period during the pendency of "properly filed" applications for state relief, many inmates would have been forced to file habeas corpus petitions while in the process of exhausting their state remedies.

The Second Circuit's interpretation of "properly filed" does not advance that objective. In respondent Bennett's case, for example, post-conviction review is mandatorily barred because his claims were, or could have been, raised on direct review. He cannot exhaust his claims by invoking a procedure – post-conviction review – that is simply unavailable to him. That is the very reason why other prisoners who made the same mistake as Bennett found their claims exhausted but procedurally barred. *See, e.g., Teague v. Lane*, 489 U.S. 288, 297 (1989); *Engle*, 456 U.S. at 125-26 n.28, 135.

The exhaustion doctrine is also not advanced when a second or successive state application that is rejected without any

review of the merits is deemed "properly filed." The exhaustion requirement is satisfied when state prisoners "give the state courts one full opportunity to resolve any constitutional issues by invoking *one complete round* of the State's established appellate review process." *Boerckel*, 526 U.S. at 845 (emphasis added). Second or successive applications that are rejected on procedural grounds – *e.g.*, because they do not genuinely raise new facts, new law or fundamental fairness – do not exhaust remedies any more than an application that is dismissed by the court clerk because it missed the filing deadline. *See Castille v. Peoples*, 489 U.S. 346, 350-51 (1989) (a claim is not "fairly presented" for exhaustion purposes "where the claim is presented for the first and only time in a procedural context in which its merits will not be considered unless 'there are special and important reasons therefor.'") (citation omitted).

C. The Doctrine of Comity Supports Construing the Term "Properly Filed" to Cover Only Applications that Comply With All State Procedural Rules

The doctrine of comity – of showing respect for state processes and the States' dignitary interests – supports the reading of "properly filed" advanced herein. As Judge Garza stated in his dissent in *Villegas, supra*, "if comity is a concern, then federal courts should look to state procedural filing requirements to ascertain whether a petition is filed properly." 184 F.3d at 476. When a State decides that certain claims may only be raised on direct review, or that second or successive applications not making certain showings are procedurally barred, comity is furthered when federal courts respect those choices. This is particularly so when the State makes clear that its rules are procedural by, for example, providing that when the

requisite showings are not made, the courts "will not consider the [application]" or "may not consider the merits" of the application. *See, e.g.*, Wash. Rev. Code § 10.73.140 (former quote); Tex. Code Crim. P. art. 11.071(5) (latter).

The States' comity interests are, of course, furthered by the exhaustion requirement and furthered to the extent the tolling provision of § 2244(d)(2) advances the exhaustion requirement. But, as noted above, the Second Circuit's unduly expansive reading of the term "properly filed" does not advance the exhaustion requirement. Prisoners who are legitimately seeking to exhaust their state remedies – by "invoking one complete round of the State's established appellate review process," *Boerckel*, 526 U.S. at 845 – may do so under the Amici States' reading of § 2244(d)(2) without fear that the one-year limitations period would expire during that time.

Moreover, the States also have a comity interest in expediting the habeas corpus process. This Court has observed that "[f]ederal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Engle*, 456 U.S. at 128. *See also In re Blodgett*, 502 U.S. 236, 239 (1992) ("None of the reasons offered in the response dispels our concern that the State of Washington has sustained severe prejudice by the 2½-year stay of execution."). That comity interest would be significantly impaired by the Second Circuit's construction of "properly filed," which, as a practical matter, delays and even vitiates the one-year limitations period in many States.

Several lower federal courts have objected that federal courts should not make the determination whether a pending state

134 F.3d at 148-49. But federal courts make such judgments routinely in order to enforce the exhaustion and procedural bar requirements. As Justice O'Connor has observed, there is a "well-settled rule that the lower federal courts, and this Court, may properly inquire into the availability of state remedies in determining whether claims presented in a petition for federal habeas corpus have been properly exhausted in the state courts." *Harris*, 489 U.S. at 268 (O'Connor, J., concurring). Further, "federal courts quite properly look to, and apply, state procedural default rules in making the congressionally mandated determination whether adequate remedies are available in state court." *Id.* at 270. *See also Teague*, 489 U.S. at 297-98 (concluding that Illinois courts would not apply "fundamental fairness" exception to its rule preventing certain claims from being raised on collateral review).[4]

It remains only to respond to the argument that the construction of "properly filed" urged herein and adopted by the Ninth Circuit would create practical problems. Specifically, the question has been raised: what happens when a prisoner who has filed a second or successive state application simultaneously or shortly thereafter files a federal habeas corpus petition as a protective measure? *See Villegas*, 184 F.3d at 472; *Lovasz*, 134 F.3d at 148. The answer is simple. The State would then be put to the choice of arguing either that the claims have not been exhausted (which in certain circumstances

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[4] It bears emphasis that federal courts are not reviewing the merits of state applications when they engage in such inquiries. Rather, they are determining whether state procedures would permit state courts to reach the merits of the applications. *See Villegas*, 184 F.3d at 474 (Garza, J., dissenting) (responding to majority's view that Congress did not authorize federal courts to review the merits of successive state applications).

might bar the State from arguing procedural default in state court) or arguing that the claims were exhausted because there is no available state remedy. The federal court would then have to decide whether the state court application is, in fact, procedurally barred – a decision that, as noted, federal courts routinely make.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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